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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-544

THE BOARD OF EDUCATION OF
THE OKLAHOMA CITY PUBLIC SCHOOLS, ETC., *et al.*,

Petitioners,

—versus—

ROBERT L. DOWELL, an infant who sues by A.L. DOWELL,
his father and next friend,

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Opinions Below

The opinion of the United States Court of Appeals for the Tenth Circuit is unreported but is reprinted in the appendix to the petition for Writ of Certiorari at pages lxxxv-xci. The opinion of the district court is reported at 338 F.Supp. 1256 (W.D. Okla. 1972) and appears in the same appendix at pages i-lxxv.

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

Questions Presented

1. Whether the district court had jurisdiction to order implementation of a constitutionally acceptable desegregation plan.

2. Whether the district court abused its discretion in ordering the implementation of a plan which desegregates all the schools within the system.

3. Whether the district court's use of a system-wide ratio as a guideline in formulating an effective plan of desegregation went beyond that permitted by this Court in *Swann* v. *Charlotte-Mecklenberg Board of Education*, 402 U.S.1 (1971).

Constitutional Provisions and Statutes Involved

This case involves the Fourteenth Amendment of the United States Constitution and particularly the equal protection clause thereof. This case also involves 42 U.S.C. Section 2000c-6 and Section 806 of Public Law 92-318.

Statement

This case involves the desegregation of the public schools of Oklahoma City, Oklahoma. During the eleven years of litigation since commencement of this suit in 1961, there have been numerous district court hearings, five appeals before the Tenth Circuit and review by this Court on four occasions.[1] In spite of this long history, the school board

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[1] *Dowell* v. *Board of Educ.*, 219 F.Supp. 427 (W.D. Okla. 1963); 244 F.Supp. 971 (W.D. Okla. 1965), aff'd 375 F.2d 158 (10th Cir. 1967), *cert. denied*, 387 U.S. 931 (1967); *Dowell* v. *Board of Educ.*, —— F.Supp. —— (W.D. Okla. Aug. 13, 1969), vacated —— F.2d —— (10th Cir. Aug. 27, 1969), —— U.S. —— (Brennan, J.

has failed to take affirmative action to eliminate segregation and establish a unitary school system. At the time of the commencement of the most recent district court hearings,[2] 78% of the public schools in Oklahoma City were at least 90% white or black in student enrollment; 31 schools of a total of 109 regular school facilities were attended entirely by students of one race. See Petitioners' Appendix at xxiv-xxvi.

At the time of the September 1971 district court hearing, the Board was operating under a secondary school desegregation plan previously approved by the court which purported to cluster high schools by academic subject matter in order to bring about mandatory participation in an integrated high school experience. The district court found, however, that the board had (without notice to or permission by the Court) altered the plan in such a way that it became essentially a freedom of choice plan. Students could enroll for all subjects required for graduation, in whatever academic area, in their own neighborhood schools—the courses located outside their neighborhood or "home base" school were all electives. The district court found that the cluster plan did not and could not work to desegregate the schools.

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reinstating district court order pending Writ of Certiorari, Sept. 3, 1969), 396 U.S. 269 (1969) (per curiam) vacating August 27 opinion of Court of Appeals; *Dowell* v. *Board of Educ., of Oklahoma City*, 307 F.Supp. 583 (W.D. Okla. 1970), aff'd 430 F.2d 865 (10th Cir. 1970), —— U.S. —— (White, J., denying application for stay Sept. 9, 1970); *Dowell* v. *Board of Educ., of Okla. City*, —— F.Supp. —— (W.D. Okla. June 13, 1971), *reversed* —— F.2d —— (10th Cir. Aug. 20, 1971); *Dowell* v. *Board of Educ.*, 338 F.Supp. 1256 (W.D. Okla. 1972), aff'd —— F.2d —— (10th Cir. Feb. 4, 1972), —— U.S. —— (Rehnquist, J. denying application for stay, Aug. —, 1972).

[2] Hearings were held pursuant to an order of the Tenth Circuit on September 21, November 18-19 and December 9, 1971.

The Board's plan for the junior high school grades projected integration primarily by the closing of an all-black junior high. The Board later decided not to close the school, with the result that the only plan in operation for the junior high grades was an inter-school activity program. The district court held that a plan for intercultural exchange was not an adequate substitute for a real plan of desegregation.

The plan the court invalidated for elementary schools entailed inter-group exchanges for 4th, 5th and 6th graders, who could participate only with parental permission. No provision was made for Kindergarten through grade 3, and the basic racial composition of "neighborhood" schools was unaltered by the part-time inter-cultural activity program.

Two educational consultants appointed by the court presented an amended plan which proposed to continue use of the cluster plan at the high school level, initiate that program also at the junior high school level, and continue the limited elementary inter-cultural exchange for grades 4-6 on a mandatory basis. Plaintiffs and the defendant school board filed objections to the consultants' plan; an educational expert retained by plaintiffs presented a plan for full-time desegregation of the Oklahoma City schools at every grade level, with the exception of Kindergarten students who would be assigned to schools near their homes. The plan involved restructuring of grade assignment patterns and development of a new feeder system, based on that arrangement.

The district court entered an order February 2, 1972, approving the plan offered by plaintiffs in light of the Board's failure to submit an alternative workable plan, and the Board's total rejection of the plans submitted by the Court's consultants and plaintiffs' consultant.

On appeal to the United States Court of Appeals for the Tenth Circuit the judgment of the district court was in all respects affirmed. —— F.2d —— (10th Cir. August 4, 1972).

Reasons for Denying the Writ

I. The Judgment Below Was Not "Void for Lack of Jurisdiction."

On August 21, 1970, the trial court, *sua sponte,* entered an order purporting to divest itself of jurisdiction of this case. On September 2, 1970, plaintiffs filed a Motion for Extension of Time in which to file Motion to Set Aside [that] Order; and on September 8, 1970, plaintiffs filed a motion requesting the court to reconsider its August 21, 1970, Order. No action was taken by the trial court on plaintiffs' September 8, 1970, motion until May 3, 1971, at which time the Court vacated its order of August 21, 1970.

The trial court stated in footnote one to its memorandum opinion that:

> ". . . on August 21, 1970, this Court entered an order, on its own motion, closing this case. The plaintiffs immediately protested and subsequently on May 3, 1971, this Court vacated its earlier order."

(See Petitioners' Appendix xxiii)

In affirming the trial court's above-stated action, the Tenth Circuit stated:

> "The appellants [school board] urge as a separate point that the trial court lost jurisdiction by the entry of an order seeking to terminate the proceedings. However, there was no loss of jurisdiction in view of the motions

which the parties thereafter filed for reconsideration. The jurisdiction was a continuing one, and following the directions of this Court to hold hearings, the parties acquiesced therein and the proceedings continued as theretofore." (See *Dowell* v. *Board of Educ. of Oklahoma City Public Schools*, —— F.2d ——, Petitioners' Appendix at xci)

The board's argument in its Petition is premised upon its carefully selective factual statement, which omits mention of plaintiffs' timely motion for reconsideration of the trial court's *sua sponte* order. Not only is the contention totally without substance in light of the actual facts, but the Court of Appeals would clearly have erred had it sustained the board's position on this issue. *Raney* v. *Board of Educ., of Gould*, 391 U.S. 443 (1968); *Wright* v. *Board of Public Instruction*, No. 71-2264 —— F.2d —— (5th Cir. Aug. 18, 1971); *Steele* v. *Board of Public Instruction*, No. 71-2265 —— F.2d —— (5th Cir. Sept. 3, 1971); *Youngblood* v. *Board of Public Instruction*, No. 71-2263 —— F.2d —— (5th Cir. Sept. 14, 1971); *Goss* v. *Board of Educ.*, of *Knoxville, Tenn.*, 406 F.2d 1183 (6th Cir. 1969); *United States of America* v. *Board of Educ., of Tulsa, Okla.*, 429 F.2d 1253 (10th Cir. 1970).

II. The District Court Properly Exercised Its Equitable Power in Ordering a Plan Which Desegregates All Schools in the System.

Petitioners allege that some schools in the system have changed their racial compositions from predominantly white to predominantly black because of residential movement only and therefore should have been exempted from the desegregation plan ordered by the district court. In support of this contention they point to the ruling of the Tenth Circuit in *Keyes* v. *School Dist. No. 1, Denver Col-*

orado, 445 F.2d 990 (10th Cir. 1971), *cert. granted,* 404 U.S. 1036 (1971), and several older cases from other Circuits.

Petitioners misstate the case on this question. No "undisputed and uncontroverted evidence" concerning any such schools was introduced below, nor was this issue raised on appeal to the Tenth Circuit in the instant case. The issue was first presented in a Motion for a Stay pending filing of a Petition for Writ of Certiorari in this Court.

Even if the issue had been properly presented below, the petitioners' allegation is without merit. The Tenth Circuit dismissed the argument as follows:

> The trial court found that there has been no substantial desegregation of the Oklahoma city schools, and the schools must thus be taken as they so exist on this appeal, in the face of the failure of the prior plan to produce the expected results . . . We do not have before us an issue concerning resegregation . . . (Appendix to Petition, xc—xci)

The obligation to desegregate may end at some point in time after school authorities have affirmatively created a unitary system. *Swann* v. *Charlotte-Mecklenberg Board of Educ.,* 402 U.S. 1, 30-31 (1971). But until that duty is undertaken and accomplished, school officials must dismantle all one-race schools in the system, even those resulting in part from shifting residential patterns. See *Flax* v. *Potts,* No. 71-2715 (5th Cir. July 14, 1971).

There is no conflict between the Tenth Circuit's *Denver* decision and this one on the issues presented by the school board. The Court of Appeals applies a consistent theory—whether correct or not, see Brief for Petitioners, No. 71-550, *Keyes* v. *School Dist. No. 1, Denver,*—to both cases.

It distinguishes between systems with past state-mandated segregation (Oklahoma City) and those without it (Denver). The same distinction was applied by the Sixth Circuit in *Deal* v. *Cincinnati Board of Educ.*, 369 F.2d 55 (6th Cir. 1966), *cert. denied*, 389 U.S. 847 (1967), also cited by the school board as being in conflict with the decision below:

> Appellants place much emphasis on *Dowell* v. *School Board of Oklahoma City Public Schools*, 244 F. Supp. 971 (W.D. Okla. 1965), but we are unable to adapt that case to the problem of racial imbalance. Despite appellants' assertion that the District Court in *Dowell* dealt with facts similar to those in this case before us, it is clear that it did not. In that case the problem was one of initial desegregation of a school system which had previously been organized along the dual racial lines condemned by *Brown*.

369 F.2d at 62-63. Thus it seems clear that the Sixth Circuit would have decided this case in exactly the same manner as the Tenth Circuit. Cf. *Kelley* v. *Metropolitan County Board of Educ.*, 463 F.2d 732, 744 (6th Cir. 1972).

III. The Plan Ordered by the District Court Does Not Require Racial Balance.

Petitioners assert that the plan approved below required racial balance in contravention of prohibitions announced in *Swann*. Not only did the District Court explicitly refuse to require racial balance, (see Appendix, p. xiv) the Court of Appeals pointedly affirmed on this issue:

> [T]he trial court has considered the Swann decision, and what we consider the prohibitions therein contained against devices to balance the school population at particular schools between black and white students,

> and thereby to go beyond desegregation. We find no attempt by the trial court to so balance the attendance. The black to white ratio in the entire system was in evidence and was considered by all concerned, but the plan approved does not attempt to achieve anything beyond desegregation. (Appendix p. xci)

A glance at the projected enrollments at the various individual schools under the plan approved by the district court demonstrates that the variance in the racial composition is easily as great as that which resulted in *Swann*. Thus there is absolutely no basis for the board's contention that the district court and Court of Appeals approved a "racial balance" plan.

CONCLUSION

Respondents pray that the petition be in all respects denied for the foregoing reasons.

Respectfully submitted,

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